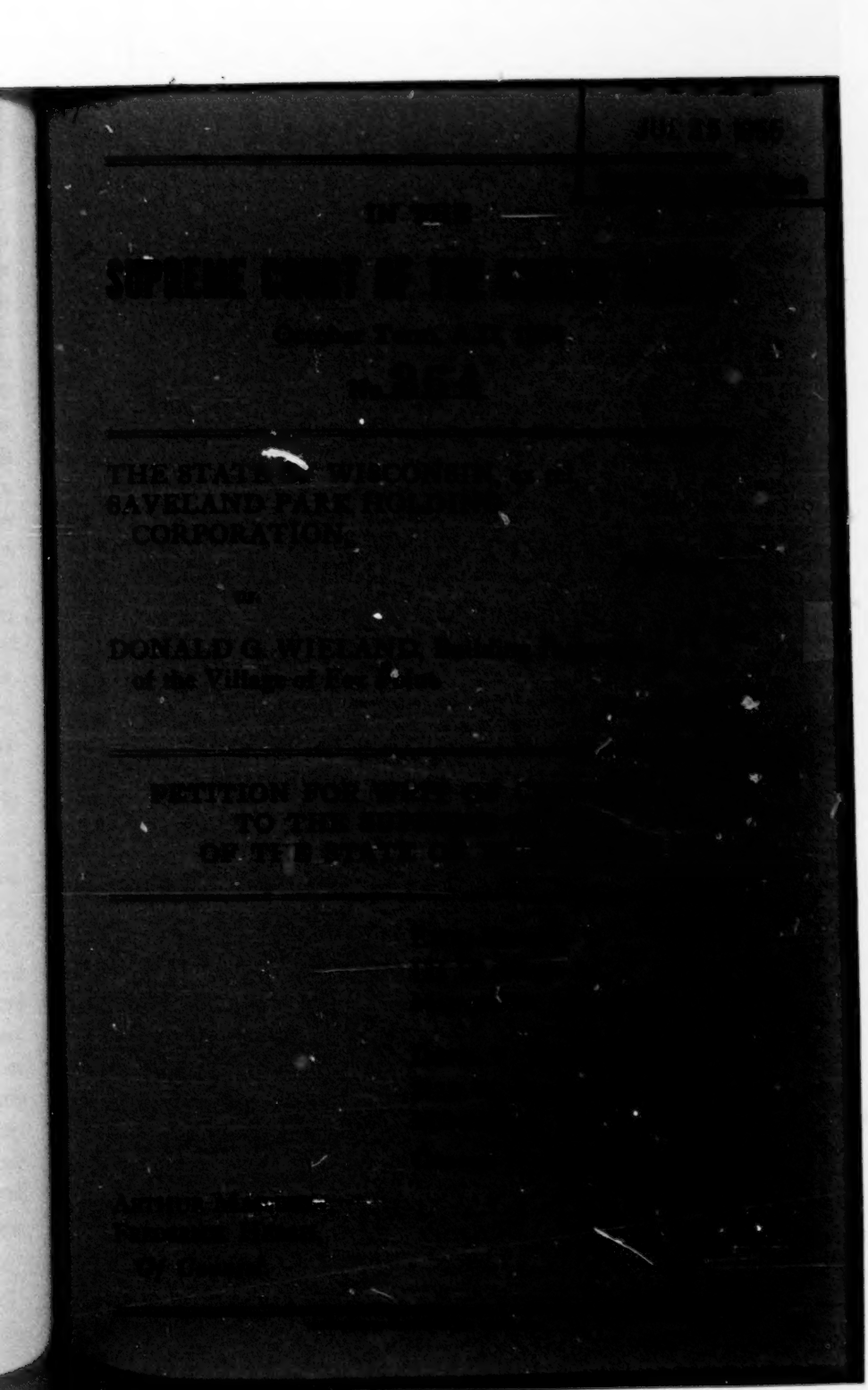

INDEX

	Page
Prayer	1
Opinions Below	2
Statement as to Jurisdiction	2
Questions Presented	3
Constitutional and Statutory Provisions Involved	4
Statement of the Case	6
Reasons Relied on for Allowance of the Writ	9

TABLE OF AUTHORITIES CITED

Baker vs. Sommerville, (1940) 138 Neb. 466, 293, N.W. 326 12

Berman vs. Parker, 348 U.S. 26 ..... 13, 16, 17, 18, 20

Brookdale Homes Inc. vs. Johnson, 123 N.J.L. 602, 10 Atl. (2nd) 477 18

Continental Oil Co. vs. Wichita (1931) Texas, 42 S.W. (2nd) 236 24

Dowsey vs. Kensington, 257 N.Y. 221, 177 N.E. 427, 86 A.L.R. 642 12

Eaton vs. Sweeny, (1931) 257 N.Y. 176, 177 N.E. 412 12

Elizabeth Lake Estates vs. Waterford, 317 Mich. 359, 26 N.W. (2nd) 788 ..... 10, 35

Euclid vs. Ambler Realty Co., 272 U.S. 365 ..... 9, 15, 20

Forbes vs. Hubbard, (1932) 348 Ill. 166, 180 N.E. 767 12

Gillette vs. Tyson (1929) 219 Ala, 511, 122 So. 830 24

Jefferson County vs. Timmel, 261 Wis. 39, 61, 51 N.W. (2nd) 518 12

Lionshead Lake Inc. vs. Wayne Township (1952) 10 N.J. 165, 89 Atl. (2nd) 693; appeal dismissed 344 U.S. 919, 73 Sup. Ct. 386 ..... 18, 19, 20

Page

Longshore vs. Montgomery (1928) 22 Ala. App. 620, 119 So. 599 24

Nectow vs. Cambridge, 277 U.S. 183 9

Roman Catholic Archbishop vs. Baker (1932) 140 Ore. 600, 15 Pac. (2nd) 391 24

Spies vs. Board of Appeals (1929) 337 Ill. 507, 169 N.E. 220 24

Standard Oil Co. vs. Bowling Green, 244 Ken. 362, 50 S.W. (2nd) 960, 86 A.L.R. 648 10

State ex rel Beery vs. Houghton (1925) 164 Minn. 146, 204 N.W. 569; affirmed in 273 U.S. 671, 47 S. Ct. 474, 71 L. Ed. 832 ..... 19, 20

State ex rel Srigley vs. Woodworth, (1929) 33 Ohio App. 406, 169 N.E. 713 12

Washington ex rel Seattle Title and Trust Co. vs. Roberge, 278 U.S. 116, 73 L. Ed. 210, 49 S.C. 50, 86 A.L.R. 654 23

West Bros. Buick Co. vs. Alexandria (1937) 169 Va. 271, 192 S.E. 881 12

White's Appeal, 287 Pa. 259, 134 Atl. 409 17

Womens' Kansas City St. Andrews Society vs. Kansas City, (CCA-8th-1932) 58 Fed. (2nd) 593 12

TEXT AUTHORITIES

17 American Bar Association Journal 163 14

Annotation at 86 A.L.R. at page 669 ..... 9, 12
86 A.L.R. at page 676 24
86 A.L.R. at page 678 18

Basset, Zoning (Published 1940 by Russell Sage Foundation) at page 97 13

STATUTES CITED

Ordinance No. 129, Village of Fox Point, Wisconsin .. 4, 6

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A.D. 1954

No.....

THE STATE OF WISCONSIN, ex rel,
SAVELAND PARK HOLDING
CORPORATION,

Petitioner,

vs.

DONALD G. WIELAND, Building Inspector
of the Village of Fox Point,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, being aggrieved by the judgment and decree hereinafter mentioned, respectfully submits its petition for a writ of certiorari to review a judgment of the Supreme Court of the State of Wisconsin, which reversed a judgment of the Circuit Court for Milwaukee County, Wisconsin, in the above entitled case.

Opinions Below

There was no officially reported opinion in the Circuit Court of Milwaukee County; however, the written opinion of the trial court appears at Pages 101-116 of the record.

The opinion of the Supreme Court of the State of Wisconsin is reported in Vol. 269 Wisconsin Reports (advance sheets) Page 262, 69 N.W. (2nd) 217 (R. Pages 192-204).

Statement as to Jurisdiction

The judgment of the Supreme Court of the State of Wisconsin sought to be reviewed was entered on March 8th, 1955, (R. Page 190). Motion for rehearing was denied on May 3rd, 1955, (R. Page 207)

The jurisdiction of this court is invoked under Title 28 U.S. Code, Chapter 81, Sec. 1257(3), on the ground that the decision of the Supreme Court of Wisconsin draws into question the validity of a statute of a subdivision of the State of Wisconsin (Ordinance No. 129 of the Village of Fox Point) on the ground of its being repugnant to the Constitution of the United States and on the further ground that petitioner claims a right, to-wit: the right to the issuance of a building permit as applied for, notwithstanding the provisions of Ordinance 129 of the Village of Fox Point, Wisconsin, said right being claimed by virtue of the Fourteenth Amendment to the Constitution of the United States.

Questions Presented

Under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States:

1) May a village enact a zoning law for the sole purpose of protecting existing property values?

2) May a village enact a zoning law for the sole purpose of promoting aesthetic values?

3) May a village building board be granted the power to reject an application for a building permit based on its opinion as to the probable effect of the architectural appeal and functional plan on property values of buildings in the adjacent neighborhood? Are these standards sufficiently objective to guarantee equal protection of the laws?

4) Are the standards to be applied by the building board so vague as to necessarily open the way for discrimination against applicants not based on objective findings but on subjective likes or dislikes?

5) Is it within the power of government to censor a creative art, viz., private architecture, on the basis of aesthetic appeal?

6) Does *Berman vs. Parker,* 348 U.S 26, mean that the Supreme Court of the United States approves zoning laws based on aesthetic considerations alone?

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment to the CONSTITUTION OF THE UNITED STATES, Section 1, Second sentence provides as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The zoning ordinances of the VILLAGE OF FOX POINT provide generally that no new building may be erected unless the owner first obtains a building permit.

Ordinance No. 129, adopted July 23, 1946, reads as follows:

> An Ordinance relating to and creating the Building Board of the Village of Fox Point.
>
> The Village Board of the Village of Fox Point do ordain as follows:
>
> SECTION 1. No building permit for any structure for which a building permit is required shall be issued unless it has been found as a fact by the Building Board by at least a majority vote, after a view of the site of the proposed structure, and an examination of the application papers for a building permit, which shall include exterior elevations of the proposed structure, that the exterior architectural appeal and functional plan of the proposed structure will, when erected, not be so at variance with either the exterior architectural appeal and functional plan of the structures already constructed or in the course of construction in the immediate neighborhood or the character of the applicable district established by Ordinance No. 117, or any ordinance amendatory thereof or supplementary thereto,

as to cause a substantial depreciation in the property values of said neighborhood within said applicable district.

SECTION 2. The Building Board shall consist of three residents of the Village, two of whom shall be architects, including within the term landscape architects, selected from a panel of not less than five established from time to time by resolution of the Village Board of the Village of Fox Point. The Village Clerk, or his deputy, shall be secretary of the Building Board and the Secretary of said Building Board shall from time to time select and request, until the requisite number is obtained, the residents listed upon said panel, to act as said Building Board whenever the Building Inspector shall request a meeting of the Building Board to consider applications for building permits which he has found comply in all respects with all other Ordinances of the Village of Fox Point. The Building Board may if it desires hear the applicant for the building permit in question and/or the owner of the lot on which it is proposed to erect the structure in question, together with any other persons, whether residents or property owners, desiring to be heard, giving such notice of the hearing as they may deem sufficient. Such hearing may be adjourned from time to time but for not more than 48 hours, and within 48 hours after the close of the hearing the Building Board shall in writing make or refuse to make the finding required by Section 1 hereof, and file it in the office of the Village Clerk who shall send a copy of it to the Building Inspector.

SECTION 3. On an appeal to the Board of Appeals, in the absence of proof to the contrary adduced before the Board of Appeals, a refusal to grant the building permit because refusal of the Building Board to make the finding required by Section 1 hereof, shall be deemed to be based upon facts sup-

porting the conclusion that the exterior architectural appeal and functional plan of the proposed structure for which a building permit was refused would, when erected be so at variance with all of the exterior architectural appeal and functional plan of structures already constructed or in the course of construction in the immediate neighborhood, or the character of the applicable district, as to cause a substantial depreciation in the property values of said neighborhood within said applicable district.

SECTION 4. Any person entitled to appeal from the grant of, or refusal of the Building Inspector to grant, said building permit, may appeal to the Board of Appeals of the Village of Fox Point in the same manner and with the same force and effect as if this ordinance had not been adopted and the Building Inspector had taken such action independently of the Building Board.

SECTION 5. This Ordinance shall take effect and be in force from and after its passage and posting.

Statement of the Case

In this case, the petitioner challenges the validity of a certain zoning ordinance of the Village of Fox Point, as being a violation of its rights under the Fourteenth Amendment to the Constitution of the United States.

Ordinance No. 129, being the ordinance involved in this case, was enacted by the village board of the Village of Fox Point as a part of its system of zoning laws and regulations affecting new buildings. The zoning ordinances of the village provide generally that no new building may be erected unless the owner first obtains a building permit. The challenged ordinance reads, in part, as follows:

(R. 128) "Section 1. No building permit for any structure for which a building permit is required shall

be issued unless it has been found as a fact by the Building Board by at least a majority vote, after a view of the site of the proposed structure, and an examination of the application papers for a building permit, which shall include exterior elevations of the proposed structure, that the exterior architectural appeal and functional plan of the proposed structure will, when erected, not be so at variance with either the exterior architectural appeal and functional plan of the structures already constructed or in the course of construction in the immediate neighborhood or the character of the applicable district established by Ordinance No. 117, or any ordinance amendatory thereof or supplementary thereto, as to cause a substantion depreciation in the property values of said neighborhood within said applicable district."

The Village of Fox Point is suburban to the City of Milwaukee, Wisconsin. For the most part, it consists of single family residences (R. 194) with very limited business and commercial development and no industrial development. (R. 131-a)

Petitioner, Saveland Park Holding Corporation, is the owner of certain real estate located within the limits of the village. The property in question is located in a "C" residence district which requires a lot area of 10,500 square feet of open area for each family, with a frontage of at least 70 feet. (R. 134) Minimum floor area for a one story residence is 900 square feet; for two stories, 750 square feet. (R. 135)

On April 12th, 1954, petitioner applied to the defendant building inspector for a building permit for the erection of a single family residence upon its property. (R. 136) The building complied in all respects with all of the zoning laws of the Village of Fox Point, with refer-

ence to height, area, lot, size, materials, and workmanship. (R. 136, 194) The building inspector denied the application for the issuance of a building permit, stating that said application was denied "pursuant with Ordinance No. 129, * * *". (R. 136) (He later stated the reason for such denial to be that the Building Board refused to make the finding approving "the exterior architectural appeal and functional plan" required by the challenged ordinance. (R. 128, 194))

The petitioner then applied to the Circuit Court of Milwaukee County for a Writ of Mandamus to compel the issuance of the desired building permit, and in its petition for said writ made the claim that Ordinance No. 129 was unconstitutional (R. 121, 122), under both the Federal and State Constitutions. (R. 107) The Circuit Court ruled that the ordinance was unconstitutional under the Fourteenth Amendment to the Federal Constitution (R. 115, 140) (Appendix p. 38) as well as under the State Constitution and ordered the issuance of the Writ of Mandamus. (R. 141)

On appeal, the Supreme Court of the State of Wisconsin reversed the ruling of the Circuit Court (R. 190), found the ordinance in question to be not in conflict with the Federal Constitution (R. 200, 204), and ordered the proceedings quashed. Motion for rehearing was denied May 3rd, 1955. (R. 207)

Reasons Relied on for Allowance of the Writ

The State Court has decided a Federal question of substance not heretofore determined by the Supreme Court of the United States and in a way probably not in accord with applicable decisions of this court.[1]

1. Under the Fourteenth Amendment, an individual's right to use his property cannot be curtailed solely for the protection of other property values.

In general, zoning ordinances are now upheld as a valid exercise of the police power of a state or municipality on the grounds that they promote the public health, safety, morals, or general welfare.

> *Village of Euclid vs. Ambler Realty Co.*, 272 U.S. 365.

However, this does not mean that all zoning laws are valid exercises of the police power. The subsequent case of *Nectow vs. Cambridge*, 277 U.S. 183, holds that:

> "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."

Under the questioned ordinance, a permit may be refused if, in the opinion of the building board, a proposed building may cause a substantial depreciation in

[1] Seven other Milwaukee suburbs have similar ordinances. The 1955 Municipal Year Book, published by the International City Managers Association, describes the present case as marking the beginning of municipal supervision of the design of private architecture. *Milwaukee Journal News item, July 17th, 1955.*

the property values of a neighborhood, although the building complies with all objective requirements of the building and zoning codes.

The effect of this ordinance is to limit the use of petitioner's property in order to maintain or increase the value of other property. The Supreme Court of Kentucky in *Standard Oil Co. vs. Bowling Green,* 244 Ky. 362, 50 S.W. (2nd) 960, 86 A.L.R. 648, says of this type of legislation:

> "But is is very doubtful, if this effort to increase or improve such (neighboring property) values be the *sole* reason for the ousting and prohibition of such a business (gas station) whether the city would have the right to so improve the economic values of the neighboring property at the expense of the economic value of the locus in question, especially where the degree to which the value of such locus in question would be thus affected would amount to great diminution and substantial annihilation."

The same result is reached by the Supreme Court of Michigan in *Elizabeth Lake Estates vs. Waterford,* 317 Mich. 359, 26 N.W. (2nd) 788 where it is held that "the conservation of property values is not by itself made a proper *sole* objective for the exercise of police power".

Petitioner concedes that *one* of the objects of the zoning law may be to preserve property values, but it will be found that in the cases where this is mentioned, there have been *other considerations* inherent in the zoning law relating to public health, safety, or morals, or promoting the orderly growth of a city to eliminate blight and slum areas. However, the ordinance here under consideration has as its *sole* purpose, the object of preserving the value of other property and has no expressed or apparent relation to public health, safety, or morals.

No other case has held that a zoning ordinance whose *sole* objective is to preserve the value of other property in the neighborhood can be upheld as a valid exercise of the police power. This case should be reviewed for the purpose of determining whether preservation of property values *by itself and without any relation to public health, safety, or morals,* is a valid ground for the exercise of police power under the Fourteenth Amendment.

2. Under the Fourteenth Amendment, the right of an individual to build a home in accordance with his own taste cannot be curtailed solely for alleged aesthetic reasons, as long as he does not create a nuisance.

While text writers have disagreed whether a zoning law may be enacted for the sole purpose of promoting aesthetic values this is the first case where a court of last resort has squarely held in the affirmative. (R. 199) In this case, unlike other zoning cases involving building area, setbacks, land use, building height, etc., the sole test by which a proposed building is judged is its exterior architectural appeal and functional plan, and the effect thereof upon surrounding property values.

It is the claim of the petitioner that government cannot control the building of a private residence by imposing restrictions on "architectural appeal", that is will persons other than the owner approve of the exterior appearance, as long as no nuisance is created. It is further claimed by petitioner that government cannot control the "functional plan" of a private residence, that is, are the rooms arranged for maximum utility, as long as the building complies with the objective standards of the structural and sanitary codes. Either of these controls is an unwarrant-

ed invasion of the freedom to use property which is guaranteed by the Fourteenth Amendment.

It was stipulated in this case that the proposed building complied with all of the zoning ordinances of the Village of Fox Point except the challenged ordinance, No. 219. Its only purported deficiencies were exterior architectural appeal and functional plan, in other words, its *aesthetic* appeal. It has always been held that aesthetic consideration *alone,* without other factors incident to public health, safety, or morals, is an insufficient basis for limiting use of property by zoning.

Many cases[2] bear out the conclusion of the author of the Annotation at *86 A.L.R. at page 669* as follows:

> "Mere aesthetic considerations in themselves do not bear such relationship to public welfare as will sustain the restrictions of zoning ordinances, although they will not render an ordinance invalid where only incidental to the main purposes thereof."

The Supreme Court of Wisconsin in the present case recognized the rule for which we contend as having prevailed in our state, as late as 1952, expressed in *Jefferson County vs. Timmel,* 261 Wis. 39, 61, 51 N.W. (2nd) 518. In the present case, however, the Wisconsin Court says,

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[2] *Baker vs. Sommerville,* (1940) 138 Neb. 466, 293 N.W. 326;
Dowsey vs. Kensington, 257 N.Y. 221, 177 N.E. 427, 86 A.L.R. 642;
Women's Kansas City St. Andrews Society vs. Kansas City, (CCA-8th-1932) 58 Fed. (2nd) 593;
Forbes vs. Hubbard, (1932) 348 Ill. 166;
Eaton vs. Sweeny, (1931) 257 N.Y. 176, 177 N.E. 412;
State ex rel Srigley vs. Woodworth, (1929) 33 Ohio App. 406, 169 N.E. 713;
West Bros. Buick Co. vs. Alexandria, (1937), 169 Va. 271, 192 S.E. 881.

> "In view of the latest word spoken on the subject by the United States Supreme Court, in *Berman vs. Parker,* * * * this development of the law has proceeded to the point that renders it extremely doubtful that such prior rule is any longer the law."

We contend that *Berman vs. Parker* was not correctly interpreted by the Wisconsin Supreme Court. This will be discussed *infra.*

There is sound reasoning behind the rule which forbids the exercise of governmental power in the field of aesthetics alone. A leading text writer, Edward M. Basset, in *Zoning* (Published 1940 by Russell Sage Foundation) says at Page 97,

> "Courts make no objection to the recognition of aesthetic purposes in zoning regulations if the regulations are based on considerations of health, safety, morals, comfort, convenience, and the general welfare of the community. As a general rule however, zoning regulations may not be based on aesthetic considerations. A zoning regulation controlling the color or the architectural style of buildings would not be upheld today by the courts. On the other hand, so many qualities are closely connected with the health, safety, and convenience of the community that police power regulations of great scope will be increasingly upheld. Quiet and the presence of natural surroundings and even vegetation, on account of its production of oxygen, may be important elements in preserving health. Considerations of light and air affect the health of the community and enter into the making of lawful zoning regulations. Insofar as other amenities accomplish the same result, they too will increasingly be recognized. It has been said that beautiful architecture is in the same way conducive to health, or at least to comfort and well-being. If all people were alike

in taste, this might be true. But even architectural experts differ as to what they consider examples of good taste. *De gustibus non est disputandum* is as true today as it was two thousand years ago. Our courts, compelled as they are to pass on the reasonableness of police power legislation prefer to cling to fields where the evidence of qualified experts will aid them in coming to a conclusion. Light, air, quiet, and the effect of vegetation on the atmosphere are subjects wherein expert evidence can assist. There can be a perception of correctness and incorrectness on the part of the court if experts disagree. But if architectural expert witnesses disagree on what is good in color, texture and architectural style, the court is left, without help, to decide a question of good taste. In countries where courts do not pronounce either for or against the reasonableness of police power enactments, municipal requirements regarding color or architectural style sometimes obtain. Usually, however, there is much criticism from those whose advice has not been followed. If in this country there should be architectural control of all buildings, by art commissions or juries, the criticism would be great, especially in cities where the regulation would fall into the hands of incompetent persons. *Freedom from control on matters of good taste often permits undesirable conditions, but it also allows experimentation which in the long run may produce good results.*"[3] (emphasis supplied)

A citizen's constitutional right to use his property for a residence which satisfies his own taste is a substantial one, not to be interfered with unless in the interest of a genuine public need. To interfere with this constitutional right in order to satisfy other residents of a neighborhood, reduces the constitutional right of the individual

[3] The forgoing was published nine years *later* than the article in *17 Am. Bar Assoc. Journal 163,* cited by the Wisconsin Court, and hence cannot be considered outdated.

to a nullity and exalts public regulation and control to the supreme position held in some of the Eastern European countries.

It is worth repeating the argument made by the late Newton D. Baker, as counsel in *Euclid vs. Ambler Realty Co.:*

> "That our cities should be made beautiful and orderly is, of course, in the highest degree desirable, but it is even more important that our people should remain free. Their freedom depends upon the preservation of their constitutional immunities and privileges against the desire of others to control them, no matter how generous the motive or well intended the control, it is sought to impose."

It is respectfully submitted that the Supreme Court of the United States should strike down this effort to extend governmental control into the aesthetic field of architecture where matters of taste and preference are supreme, and should preserve this area for normal progress through development of new ideas by talented individuals.

3. The ordinance, by attempting censorship over a creative art on the basis of its artistic appeal alone, is beyond the power of government.

The essence of the ordinance is censorship by government over architectural design of private residence buildings. Not size, safety, sanitation, light and air, traffic conditions, elimination of blight,— none of these have any bearing upon the operation of the ordinance. The ordinance is concerned only with exterior architectural appeal and functional plan of a proposed structure, style, color, and design among other things. This

case marks the extension of governmental power into a field of the arts, where matters of taste and preference have normally been considered supreme.

An analogy may be drawn to a situation where government attempts to control the contents of a book or periodical. In such cases, the freedom of the artist is protected. He may not create or circulate anything obscene or promote a breach of the peace, but government may not censor his production on the ground that it is not likely to please others. Similary with architecture, government is justified in preventing the creation of a nuisance or of a structure which may be dangerous to health or safety, but until now none of our courts have held that government may forbid a private architect's creation on the ground that others may not approve of its artistic value. This ordinance is a dangerous precedent which, if allowed to stand, will be an entering wedge whereby our local governments may censor a creative art, on the basis of taste or preference.

4. The authorities cited by the Wisconsin Supreme Court in support of its ruling indicate erroneous interpretation of the decisions of the United States Supreme Court.

The Supreme Court of Wisconsin cited, as authority for its change of attitude on aesthetic zoning, the case of *Berman vs. Parker,* 348 U.S. 26, 75 Supreme Court 98.

Two elements distinguish *Berman vs. Parker* from the instant case, and in our view make the same inapplicable. First, *Berman vs. Parker* was a condemnation case wherein the power of eminent domain was being considered. Second, the objetcive sought to be obtained in *Berman vs. Parker* was elimination of slums and blight, breed-

ing grounds for crime and disease. Neither of these items are present in our case.

There is a well established distinction between the operation of zoning laws and the operation of the power of eminent domain. The distinction is well pointed out by the Pennsylvania Supreme Court in the case of *White's Appeal,* 287 Pa. 259, 134 Atl. 409:

> "Police power should not be confused with eminent domain. Police power controls the use of property by the owner for the public good, its use otherwise being harmful; while eminent domain and taxation take property for public use. Under eminent domain, compensation is given for property taken, injured or destroyed, while under the police power no payment is made for diminution in use, even though it amounts to an actual taking or destruction of property."

Furthermore, the problem dealt with in the *Berman* case is completely different from the problem in ours. In our case, property is to be used for a one-family residence to be erected in a residential village of high standards,[4] and the ordinance which prevents its use operates only because of the architectural appeal and functional plan of the proposed structure. This cannot be compared with the *Berman* case, involving condemnation of property for slum clearance in an underprivileged district of Washington, D.C. where 64.3% of the dwellings were beyond repair, where 57.8% of the dwellings had outside toilets, where 60.3% of the dwellings had no baths, where 82.2% of the dwellings had no wash basins or tubs, and 83.8% had no central heating. Furthermore, in that case the District director of health made a specific finding

[4] Minimum lot size for family is 70 feet by 150 feet of *open area;* minimum building area-first floor, is 750 square feet for a two story dwelling, 900 square feet for one story.

pursuant to Act of Congress that it was necessary to redevelop the area *in the interests of public health*. The public ends sought to be attained in the two cases are so dissimilar that *Berman vs. Parker* cannot be valid authority for the holding in the instant case.

Furthermore, the Supreme Court of the United States said in *Berman vs. Parker* that Congress could legislate to make the nation's capital "beautiful *as well as* sanitary". (Italics ours). The U.S. Supreme Court never said that legislation could be passed for purposes of beauty alone, but indicated that there was no objection if aesthetics was *combined* with some other legitimate object of governmental action. This quotation was misinterpreted by the Wisconsin Court, so that it apparently misconstrued the effect of the holding of the United States Supreme Court in *Berman vs. Parker* and used this case as authority for purely aesthetic zoning.

The Wisconsin Supreme Court also misinterpreted the effect of certain decisions in the State of New Jersey and particularly *Lionshead Lake Inc. vs. Wayne Township* (1952) 10 N.J. 165, 89 Atl. (2nd) 693 wherein an appeal was dismissed for want of a substantial Federal question in 344 U.S. 919, 73 Sup. Ct. 386.

It is pointed out in the Annotation at 86 A.L.R. at page 678, that the New Jersey cases on the subject of zoning laws are peculiar to that state. Early cases such as *Brookdale Homes Inc. vs. Johnson,* 123 N.J.L. 602, 10 Atl. (2nd) 477, held that certain zoning laws could not be sustained as an exercise of the police power under the New Jersey constitution. Thereafter an amendment to the state constitution was submitted to the voters and ratified; this specifically gave broader power to governing bodies in enacting zoning laws. The language quoted

by the Wisconsin Supreme Court from a New Jersey decision paraphrases the language of the New Jersey constitution which permits zoning as a method of maintaining the value of property *among other things.*

However, the effect of the Fourteenth Amendment on a zoning law which provides for maintaining property values only, and this through approval of architectural aesthetics, was not involved in *Lionshead Lake Inc. vs. Wayne Township.* Accordingly, it would appear that since no Federal question was raised in the New Jersey court in that case, the appeal to the United States Supreme Court was properly dismissed for lack of a substantial Federal question. This should not be construed as Federal Supreme Court approval of the language of the *Lionshead Lake Inc. vs. Wayne Township* decision.

In our case, the Federal constitutional question was raised at the very beginning of the case in the petition for a writ of mandamus, and was continually before the court through all stages of the proceedings as will be seen from an examination of the opinion and findings of the trial court and the opinion of the Wisconsin Supreme Court. Hence, we have here two points which were lacking in the New Jersey case. First, the existence of a substantial Federal question raised at all stages of the proceedings, and second, a zoning law which is completely different from that under discussion in the New Jersey cases since it is concerned only with exterior architectural appeal and functional plan, neither of which were present in the New Jersey case.

State ex rel Beery vs. Houghton (1925), 164 Minn. 146, 204 N.W. 569, affirmed in 273 U.S. 671, 47 S. Ct. 474, 71 L. Ed. 832, is cited by the Wisconsin Court as authority for zoning based on preservation of property

values alone. This case was identical with *Euclid vs. Ambler Realty Co.* and was affirmed without opinion on the authority of the earlier case. It does not touch on the problem presented here.

It is therefore respectfully submitted that the Wisconsin Supreme Court has misinterpreted the language used in *Berman vs. Parker,* and has also misconstrued the effect of the dismissal of the appeal in *Lionshead Lake Inc. vs. Wayne Township,* and the affirmance of *State ex rel Beery vs. Houghton.* The Wisconsin Court construed these to mean that the U.S. Supreme Court will uphold purely aesthetic zoning for the sole purpose of preserving property values. Review is necessary here in order to correct the error.

5. The wide discretion given to the Building Board to pass upon the exterior architectural appeal and functional plan of a proposed residence without any possibility of objective standards for its determination denies to the petitioner due process of law and equal protection of the laws guaranteed in the Fourteenth Amendment.

The ordinance requires that before issuance of a permit the Building Board must make a finding "that the exterior architectural appeal and functional plan of the proposed structure will, when erected, not be so at variance with" (existing structures erected or contemplated) "in the immediate neighborhood" * * * "as to cause a substantial depreciation in the property values of said neighborhood within said applicable district."

The standard which the ordinance permits the Building Board to apply in granting or denying a building permit is necessarily vague and subjective. It depends

upon the Board's opinion as to the "exterior architectural appeal and functional plan" of the proposed building. What is *appealing* and appears *functional* to one architect may not be so to another.

Furthermore, the Building Board must consider whether the exterior architectural appeal and functional plan of the proposed structure are "so at variance" with structures already existing or in the course of construction. Does this *require* conformity of structural types, or does it *require* variety? The Board alone determines the governmental policy, and may change its policy at will, from case to case.

Thus suppose that owner "A" erects a colonial residence. Owner "B" wishes to erect an identical building next door. The Board may decide that "the appeal" of two identical buildings will depreciate neighborhood values — therefore refuse owner "B" a permit. Or it might grant owner "B" a permit and refuse a permit for a colonial residence to owner "C" on the ground that while two similar buildings will not depreciate values of a neighborhood, three will do so. Or suppose that owner "A" erects a colonial type residence and owner "B" wishes to erect a modern style ranch home on the adjacent lot. The Board may decide that the great variance between the "appeal" of the two styles will depreciate values of the neighborhood and therefore deny owner "B" a permit. Or owner "B" may be granted a permit but owner "C" may be denied a permit for either a colonial or a ranch house because of the Board's notions as to proper balancing of architectural styles. Moreover, the Board may grant a permit to applicant "C" on one day, and the next day it may change its policy and deny the permit in identical circumstances to applicant "D".

The Building Board must also determine whether a proposed building *will substantially depreciate* property values in the immediate neighborhood. It is common knowledge that in forming opinions as to the value of an existing structure, experts differ widely. Obviously, there is room for more difference of opinion in judging the value of a structure not built, but only proposed. And there is ground for even more divergence of opinion as to the "appeal" of a structure, or how it will affect the value of other property in the neighborhood. There is uncertainty in the extent of the affected "neighborhood" in any given case. Yet it is in these shadowy and gossamer realms of subjective opinion that a person's right to use his property is determined.

And it should be remembered that the board is not required to give a reason for its denial of a permit in any given case. In our case, in fact, the initial denial of the permit did not state any reason whatsoever.

The Wisconsin Supreme Court found, in the provisions for review, a safeguard against arbitrary and discrimitory action. But on review of a particular Board decision, by certiorari, a court may not say that one of the determinations of policy is without any basis in fact, since the policy determination with respect to "exterior architectural appeal and functional plan", extent of variance permitted or required, "substantial value," and "immediate neighborhood", depend in the last analysis upon the subjective opinions of the members of the Building Board.

Because the Building Board may change the subjective standards of decision at will, a well-to-do socialite might have no difficulty in obtaining a building permit, while a negro doctor or lawyer with identical plans

might find it impossible. Obviously, here is a situation where discrimination based on race, religion, national origin, or other extraneous considerations may run rampant, disguised in any number of pious cloaks, and the courts will be powerless to deal with it.

The trial court said of these matters:

> "An ordinance which requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." (R. 112)

The Wisconsin Supreme Court found nothing indefinite in the standards (R. 204).

It is the petitioner's contention that the introduction of so many uncertain elements of opinion into the standards which determine how he may use his property, if at all, creates a situation wherein his rights are determined by the subjective opinions of the members of the Building Board and not by any objective test. This marks a complete departure from the constitutional ideal — a government of laws and not of men.

This is similar to giving the owners of property in a given neighborhood, the right to prevent an otherwise lawful building permit from being issued purely on the basis of subjective likes or dislikes and without any objective standards.

This type of arbitrary zoning without objective standards has already been stricken down by the United States Supreme Court in *Washington ex rel Seattle Title and Trust Co. vs. Roberge,* 278 U.S. 116, 73 L. Ed. 210, 49 S.C. 50, 86 A.L.R. 654. In that case the Supreme Court analyzed a zoning ordinance which required the con-

sent of 66% of neighboring property owners before property in a residential neighborhood could be used as a home for the aged; no standard guided the determination of the property owners. The United States Supreme Court said,

> "The delegation of powers so attempted is repugnant to the due process clause of the Fourteenth Amendment."

To the same effect, see *Annotation 86 A.L.R., Page 676,* as follows:

> "A delegation of power uncontrolled by any standard or rule prescribed by legislative action, to owners of adjoining land to make inoperative a permission otherwise granted by the ordinance to erect within a residence district a certain type of building, itself not likely to prove a nuisance, is repugnant to the due process clause of the Fourteenth Amendment to the Federal Constitution."[5]

Where the same rule of law does not necessarily apply to all persons, but their rights may vary according to subjective opinions of the governing authority, there is no "equal protection of the laws" as required by the Fourteenth Amendment.

CONCLUSION

Liberty of property, guaranteed by the Fourteenth Amendment, means among other things that an individual may build his own home on his own property according to the architectural style and plan of his own choosing.

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[5] Citing *Spies vs. Board of Appeals* (1929) 337 Ill. 507, 169 N.E. 220, *Longshore vs. Montgomery* (1928) 22 Ala. App. 620, 119 So. 599, *Gillette vs. Tyson* (1929) 219 Ala. 511, 122 So. 830; *Roman Catholic Archbishop vs. Baker* (1932) 140 Ore. 600, 15 Pac. (2nd) 391, *Continental Oil Co. vs. Wichita* (1931) Texas, 42 S.W. (2nd) 236.

Government may constitutionally limit this freedom, to prevent a nuisance, to impose sanitary or safety requirements, or for other legitimate purposes connected with health, safety, and morals. But when a village government, through imposition of vague and subjective standards of the village Building Board, interferes with the individual's freedom for the sole purposes of maintaining the value of other property and promoting the aesthetic appearance of the village, then the great importance of the constitutional freedom overbalances the slight public interest involved in its limitation. Such zoning ordinances as follow the pattern of ordinance 219 of the Village of Fox Point should be stricken down.

For which reasons, petitioner respectfully requests that a Writ of Certiorari should be granted.

Respectfully submitted,

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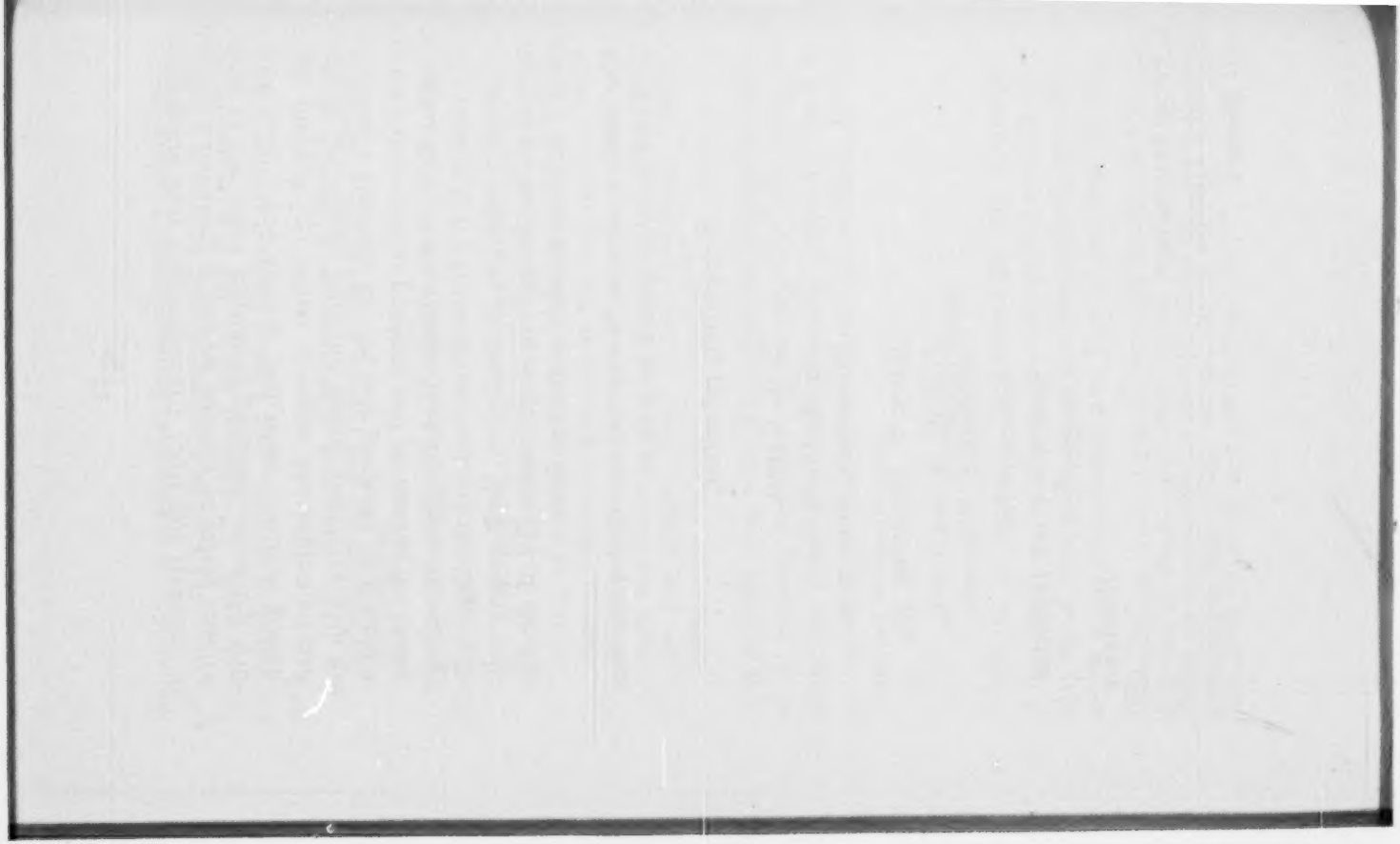

INDEX TO APPENDIX

	Page
Opinion and decision of trial court by Hon. LEO B. HANLEY, Judge of the Circuit Court of Milwaukee County	27
Judgment of the Circuit Court of Milwaukee County	40
Opinion of the Supreme Court of the State of Wisconsin by Hon. Justice GEORGE R. CURRIE	42
Judgment of Supreme Court of Wisconsin	56

OPINION AND DECISION OF TRIAL COURT

(Formal Portions Omitted)

Petition on relation of Saveland Park Holding Corporation for a writ of mandamus to command the defendant Donald G. Wieland as Inspector of Buildings of the Village of Fox Point to issue the relator a building permit to erect a residence building on its premises.

In his return defendant based his refusal to issue the permit upon a zoning ordinance, No. 129, which requires the Building Board to make a finding that the exterior architectural appeal and functional plan of the proposed structure would not be so at variance with either the exterior architectural appeal and functional plan of the structures already constructed or in the course of construction in the immediate neighborhood or the character of the applicable district established by ordinance as to cause a substantial depreciation in the property values of said neighborhood within said applicable district.

An alternative writ was issued, and the action was tried in this branch of the Circuit Court on June 1, 1954. The following statement of facts constitutes in substance my findings of fact herein:

That the realtor is a Wisconsin corporation duly organized and existing under the laws of the State of Wisconsin with its principal place of business at 2110 West National Avenue, in the City of Milwaukee, Milwaukee County, State of Wisconsin.

That the Village of Fox Point is a municipal corporation duly incorporated since 1926 and existing under

the laws of the State of Wisconsin, consisting of approximately two and one-half square miles, with the vast majority of the territory in the village limited to residential purposes.

That Donald G. Wieland for some time prior to the 12th day of April, 1954, was, and still is, the duly appointed and qualified Building Inspector for the Village of Fox Point, authorized to grant and issue permits to owners of real estate in said village for the erection and construction of buildings under Ordinance No. 117 as amended and supplemented, including Ordinance No. 129 adopted July 23, 1946, and subsequent amendments, including Ordinance No. 160 as amended and supplemented.

That the Village of Fox Point pursuant to Section 3 (a) of Ordinance No. 160 eliminated industrial use districts from is official zoning map No. 5.

That said Ordinance No. 160 provides for the following uses in a "C" residential district:

> "C. (1) In a 'C' residence district no building or premises, unless otherwise provided in this Ordinance, shall be erected or used, except for one or more of the following uses, together with accessory uses incident to the permitted use; provided always the accessory use does not constitute or become a public or private nuisance.
>
> (a) Dwellings
>
> Provided that the repeal of subparagraph (c) is without prejudice to the expansion of the present Fox Point-Bayside School or the recreational program on its present site and adjacent Village owned property and the erection of Cardinal Stritch College, upon compliance with the provisions of Ordinance No. 160 as originally enacted."

That the Ordinance provides further in part as follows:

"(2) In a 'C' residence district, no building may be erected, enlarged or altered in such a way that the open area of a lot upon which a dwelling is erected or proposed to be erected shall be reduced to less than 10,500 square feet for each family. Every lot in a 'C' residence district shall have a frontage of at least 70 feet. No building not erected for a dwelling shall occupy more than 15% of the gross area of the lot or exceed a height of 30 feet above the proposed grade of the ground.

That the premises in question are located in a "C" residence district.

That the building code of the Village of Fox Point establishing the minimum ground area in the Village upon which a residence may be constructed was repealed and is now known as Ordinance No. 169 of the Village of Fox Point and reads as follows:

"The Village Board of the Village of Fox Point do ordain as follows:

Section 1. Ordinance No. 101 is hereby repealed and subparagraphs (9) and (10) of Section 10 of Ordinance No. 158 are hereby amended to read as follows:

'(9) No one-story residence shall hereafter be erected in the Village of Fox Point, the ground area of which within the perimeter of the building at grade, exclusive of porches and garages and other outbuildings, less than 900 square feet.

'(10) No residence of two stories or more shall hereafter be erected in the Village of Fox Point, the ground area of which within the perimeter of the building at grade, exclusive of porches and garages and other outbuildings, is less than 750 square feet.'

Section 2. This ordinance shall take effect and be in force from and after its passage and the filing in the office of the Clerk of proof of posting thereof, as provided by law and the ordinances of this Village.

PASSED AND ADOPTED by the Village board of the Village of Fox Point this 26th day of October, 1950."

That the petitioner owns the following described premises situated in the Village of Fox Point, Milwaukee County, Wisconsin, to-wit:

Lot numbered Fourteen (14), in Block Numbered One (1), in Carl Miller Subdivision No. 4 being a part of the North East One-quarter (¼) of Section Twenty (20) and the North West One-quarter (¼) of Section Twenty-one (21), in Township Eight (8) North, Range Twenty-two (22) East, in the Village of Fox Point.

That said above described premises pursuant to Section 3 (a) of said zoning code are located in a "C" residence district.

That the residence for which a permit was requested by the petitioner to be constructed on the premises in question complies with all local ordinances except Ordinance No. 129.

That on or about the 12th day of April, 1954, said petitioner made due application to said defendant for the issuance of a permit for the erection of a single family residence upon said premises described above and was ready, willing and able to pay the required fee for such permit.

That said defendant refused and still refuses to issue a permit to said petitioner and denied said permit, alleging as follows:

"Your application was denied pursuant with Ordinance No. 129, an Ordinance relating to and creating the Building Board of the Village of Fox Point.

That said ordinance, namely, Ordinance No. 129 of the Village of Fox Point, and specifically Section 1 thereof, reads as follows:

> *"Section 1.* No building permit for any structure for which a building permit is required shall be issued unless it has been found as a fact by the Building Board by at least a majority vote, after a view of the site of the proposed structure, and an examination of the application papers for a building permit, which shall include exterior elevations of the proposed structure, that the exterior architectural appeal and functional plan of the proposed structure will, when erected not be so at variance with the structures already constructed or in the course of construction in the immediate neighborhood or the character of the applicable district established by Ordinance No. 117, or any ordinance amendatory thereof or supplementary thereto, as to cause a substantial depreciation in the property values of said neighborhood within said applicable district."

Under the facts in this case the only question presented is whether the zoning ordinance of the Village of Fox Point known as Ordinance No. 129 insofar as its effects the right of the relator to obtain a building permit is a valid, enforceable enactment.

An examination of the ordinance to ascertain what it is and what it does discloses that it prevents the issuance of a building permit for any structure unless the Building Board finds as a fact that the exterior architectural appeal and the functional plan will not be so at variance with either the architectural appeal and functional plan of structures constructed, or in the process

of construction, in the immediate neighborhood as to cause a substantial depreciation in the property values of the neighborhood within the district.

An examination of the territory upon which the ordinance is to operate discloses that the area was incorporated as a village in 1926 and consists of approximately two and one-half square miles, and from the time shortly after its incorporation up to the present almost the entire area has been zoned for residential use only. At present there is a small business district and a relatively small institutional district. The vast majority of the village is limited to residential purposes.

The ordinance as a whole is assailed by the relator who contends that the ordinance is unconstitutional in that it contravenes both provisions of the federal and state constitutions, namely, the Fourteenth Amendment to the Constitution of the United States, which provides:

> "Nor shall any state deprive any person of life, liberty or property without due process of law."

and Article 1, Section 13, of the Constitution of the State of Wisconsin, which provides:

> "Property of no person shall be taken for public use without just compensation therefor."

More specifically the relator contends that the ordinance does not promote the health, safety, morals or general welfare of the community; that it is an arbitrary and unreasonable exercise of the police power; that it is too vague to enforce and provides no norms of standards upon which it can be applied without caprice; that the ordinance is based solely upon purely esthetic considerations.

It can be conceded that the state under the police power has the right to limit the use of private property for the purpose of preserving the public health, safety, morals and to promote the public welfare; that the state can delegate its police power to a municipality; that where pursuant to such delegation a municipality exercises such power, it is to be presumed that such power has been legally exercised; and that where such power has been legally exercised there is no taking of private property without compensation just because some legal use of the property has been restricted.

It can be conceded also that the police power is not unlimited and must not be arbitrarily exercised; that it cannot be invoked to promote merely private comfort and welfare; and while an ordinance is presumed to be valid, any declaration therein that it is enacted to protect public health, safety, morals and public welfare will not render the ordinance valid as being within the police power unless there is some reasonable relation between such purpose and the regulation prescribed.

The restriction that the exterior architectural appeal and functional plan of the proposed structure will when erected not be so at variance with either the architectural appeal and functional plan of the structures already constructed, or in the course of construction, in the immediate neighborhood, or the character of the applicable district * * * as to cause a substantial depreciation in the property values * * * bears no apparent relation to the public health, safety or morals, nor does the ordinance contain any definite or fixed standards by which the reasonableness or the necessity for the restriction may be measured or determined, nor is the restriction necessarily uniform or definite in its application, for the

Building Board has wide discretion in the term "so at variance." This formula "so at variance" is, to say the least, an uncertain substitute for a constitutional guarantee which assures to citizens the right to hold, enjoy or use their property as they see fit so long as they do not thereby injuriously affect the health, safety and welfare of the public.

> "Zoning restrictions on the general rights of a landowner are imposed in the exercise of the police power, and to justify the exercise of such governmental power, the zoning restriction imposed must bear a substantial relation to, or be reasonably necessary for, the public health, safety, morals, or general welfare." *58 Am. Jur. 955.*
>
> "It is requisite to the validity of a zoning ordinance that the restrictions to be imposed tend, in some degree at least, to promote public health, morals, safety or welfare." *Senefsky v. Huntington Woods,* 149 A.L.R. 1443, 307 Mich., 728, 12 N.W. 2d 387.

The above rule is stated in the case of *Geisenfeld v. Shorewood,* 232 Wis. 410, 417. Our court in that case also cited as authority the case of *Euclid v. Ambler,* 272 U.S. 365, 54 A.L.R. 1016, in which it was stated:

> "In interpreting police regulations they must be interpreted in the light of the conditions and circumstances and the particular needs and situation of the particular community, and if in the light of these conditions, the legislation cannot be said to have no relationship to health, safety and the general welfare, then the legislation must be sustained and held valid."

What reasonable relationship has the exterior architectural appeal and functional plan of a structure in a restricted residential district to the health, safety, morals or general welfare?

It is apparent that the controlling factor behind the ordinance was the preservation of existing property values in the immediate neighborhood. No test was given of any other or different purpose. The ordinance is concerned not with any injurious uses of property, other ordinances have already provided for those regulations.

> "The conservation of property values is not by itself a proper sole objective for exercise of police power * * *"
>
> *Elizabeth Lake Estates vs. Waterford Tp.*, 26 N.W. 2d 788.

The zoning ordinance must be reasonable and its reasonableness becomes a test of its legality. By no reasonable view of the matter could it be considered that the ordinance and its enforcement tend to promote public health, safety, morals or general welfare.

Turning to the provisions of the ordinance to ascertain just what its effect is, we find that it restricts the erection of structures in a restricted residential area where the proposed structure's exterior architectural appeal is so at variance with other structures. In confers upon the Building Board, and then upon the Board of Appeals, the right to prevent the erection of any new building where this situation is found to exist as a matter of fact. This power is granted without any directions, rules or standards for determining that the exterior architectural appeal and functional plan is so at variance with other structures, but leaves that question to be determined by the unguarded and unlimited discretion of the Building Board.

The very subject matter of the ordinance is abstract. "Exterior architectural appeal" is entirely different than

exterior architectural design. The test "so at variance" is indefinite, and the area "immediate neighborhood" is undefined. The ordinance could not be effective in the area of the village adjacent to surrounding municipalities where architectural appeal may vary greatly. The words "immediate neighborhood" are quite susceptible of variation. The term is elastic and subject or dependent upon circumstances, and may be equally satisfied by areas measured by yards or by miles. The testimony of the witness for the defendant showed a different interpretation as to the meaning of "immediate neighborhood." Likewise the term "substantial depreciation" is indefinite, especially in view of the fact that such a finding must result from a difference in exterior architectural appeal and functional plan. That certainly is not a reasonable measure of establishing depreciation. The effect of this ordinance would be to compel the relator and other home builders to ascertain the exterior architectural appeal and functional use of all properties in the immediate area in order to submit building plans that might satisfy the Building Board without affording him a comprehensive guide, rule or information as to what must be done or what must be avoided in order that he or other builders may know how to comply with the requirements of the ordinance.

In order to comply with the provisions of this ordinance a builder might be required to submit numerous plans before approval by the Building Board would be granted. An ordinance which requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. Uncertainties in this ordinance deprive persons of their property without due process of law.

The interpretation of the phrases in the ordinance might also vary with the changing personnel of the officials administering the law so that the use of all property would depend not upon certain and definite laws uniform in their application, but upon arbitrary and changing views of individuals.

> " * * * the final evidentiary test of the legitimacy of a police regulation is whether it is reasonable under all the circumstances. There must be reasonable ground for the police interference and also the means adopted must be reasonable for the accomplishment of the purpose in view."
>
> *Mehlos v. Milwaukee,* 156 Wis. 591.

The plaintiff's last objection to the ordinance is that it is based solely on esthetics. Such objection appears to be proper. It is pointed out in *58 Am. Jur.* 595, Sec. 30, that the general rule is that the zoning power may not be exercised for purely esthetic considerations, but that there are authorities which indicate that the rule on this subject is undergoing development and it has been declared by some authorities in relation to the validity of zoning laws that esthetic considerations are not wholly without weight and may be taken into account where other elements are present to justify the regulation under the police power.

In the case of *Baker v. Sommerville,* 293 N.W. 326, an ordinance was declared void which attempted to prevent the construction of one-story homes resulting alone from esthetic standards. The court there stated:

> "Beautiful city residences, homologous lines in architecture and symmetry in construction appeal to artistic tastes and should be respected in connection with substantial zoning regulations for the promotion of the public welfare, but aesthetics alone for

> the purpose of zoning ordinances do not seem to be a source of police power, according to the weight of authority."

In the case of *Brookdale Homes, Inc. v. Johnson,* 123 N.J.L. 602, 10 A. 2d 477, it was also stated:

> "An ordinance providing that no building should be erected with its roof ridge less than 26 feet above building foundation in a certain residential zone did not promote pubic health, safety, and general welfare, and hence ordinance was invalid."

In the case of *Wolverine Sign Works v. City of Bloomington,* 271 N.W. 823, it was stated that esthetics may be an incident but cannot be the moving factor in determining the validity of building restrictions under the police power.

In the case of *Jefferson County v. Timmel,* 261 Wis. 39, 61, our Supreme Court had occasion to comment on the lower court's finding that

> " 'The present Highway 30 is beautiful. For esthetic reasons this beauty should be preserved.' This court aparently has not heretofore upheld a zoning ordinance on the ground of esthetic reasons."

The court further commented:

> "We find it unnecessary in upholding the validity of the ordinance to resort to esthetic considerations because the promotion of safety on Highway 30 is sufficient to support the exercise of police power."

The Court is of the opinion that the Board of Trustees in adopting Ordinance No. 129 clearly exceeded the bounds of legislative discretion and that the ordinance is unconstitutional and void as being clearly arbitrary and unreasonable and having no substantial relation to

the public health, safety, morals or general welfare and based upon esthetic considerations. It violates rights guaranteed under the Fourteenth Amendment to the Constitution of the United States, and Article I, Section 13, of the Constitution of the State of Wisconsin and is clearly unconstitutional and void.

The Court in reaching this conclusion exercised extreme caution which is required before declaring void any zoning ordinance upon constitutional grounds and was aware of the rule of the presumption of validity as laid down in the case of *Geisenfeld v. Shorewood,* 232 Wis. 410; *LaCrosse v. Elbertson,* 205 Wis. 207; *State ex rel. Normal Hall, Inc. v. Gurda,* 234 Wis. 290.

A peremptory writ of mandamus should be issued requiring the defendant to issue to the relator the building permit applied for.

Formal findings may be prepared by counsel for the plaintiff pursuant to the above decision.

Dated at Milwaukee, Wisconsin, this 3rd day of August, 1954.

By the Court:

Leo B. Hanley,
Circuit Judge.

JUDGMENT

(Formal Portions Omitted)

This action having come on for trial upon the petition of the relator herein, the return of the defendant and the answer of said relator thereto, on the 1st day of June, 1954, at the regular April Term, 1954, of this Court before the Honorable Leo B Hanley, Judge of Said Court, and the Court having filed its findings of fact herein and the Court having determined as conclusions of law that the relator is entitled to a peremptory writ of mandamus as prayed in the petition and to the recovery of costs and attorney's fees as hereinafter adjudged, and that Ordinance No. 129 of the Village of Fox Point is unconstitutional and void.

Now, upon motion of David V. Jennings, Jr., attorney for said relator:

It is Adjudged and Decreed that the said Saveland Park Holding Corporation do have and recover of the said Donald G. Wieland, Building Inspector of the Village of Fox Point, the sum of Fifty-two and 30/100 Dollars, taxed as the cost of this action, and One hundred and No/100 ($100.00) Dollars, attorney's fees, amounting in all to the sum of One Hundred Fifty-two and 30/100 Dollars, and that the relator have execution therefor.

It is Further Adjudged and Decreed that the relator have a peremptory writ of mandamus and that the same do issue forthwith directed to and commanding the said defendant, Donald G. Wieland, Building Inspector of the Village of Fox Point, upon the pain and peril that shall fall thereon for refusal, that he issue to the relator,

the building permit applied for a structure to be built on the following described premises.

> Lot numbered Fourteen (14), in Block numbered One (1), in Carl Miller Subdivision No. 4, being a part of the North East One-quarter (¼) of Section Twenty (20) and the North West One-quarter (¼) of Section Twenty-one (21), in Township Eight (8) North, Range Twenty-two (22) East, in the Village of Fox Point, Milwaukee County, Wisconsin, commonly known as 7033 North Fairchild Circle, and as set forth in its application submitted April 12, 1954.

It Is Further Adjudged and Decreed that Ordinance No. 129 of the Village of Fox Point is unconstitutional and void.

Dated at Milwaukee, Wisconsin, this 11th day of October, 1954 at 3:15 P.M.

By the Court:

Francis X. McCormack,
Clerk.

By Roy J. Donovan,
Deputy Clerk.

No. 209

AUGUST TERM, 1954

STATE OF WISCONSIN : IN SUPREME COURT

State ex rel Saveland Park Holding Corp.
Respondent,

v.

Donald G. Wieland, Building Inspector
of the Village of Fox Point,
Appellant.

APPEAL from a judgment of the circuit court for Milwaukee county: Leo B. Hanley, Circuit Judge. *Reversed.*

Petition on relation of Saveland Park Holding Corporation (hereinafter referred to as the "relator") for a writ of mandamus to command the defendant Donald G. Wieland, as building inspector of the Village of Fox Point, to issue the relator a building permit to erect a residence building on its premises in said village.

An alternative writ of mandamus was issued and the return of the defendant thereto based his refusal to issue the permit upon village zoning ordinance No. 129, which requires, as a condition precedent to the issuing of a building permit, the Building Board of the village to make a finding that the exterior architectural appeal and functional plan of the proposed structure will not be so at variance with those of other structures already constructed, or in the course of construction, as to cause a substantial depreciation in the property values of the neighborhood.

A trial was had to the court upon the petition and the return thereto. Under date of October 11, 1954, judgment was entered adjudging that said ordinance No. 129 is unconstitutional and void, which judgment directed that a peremptory writ of mandamus be issued commanding the defendant to issue a building permit to relator. From such judgment the defendant building inspector has appealed.

CURRIE, J. The sole issue on this appeal is the constitutionality of ordinance No. 129 of the village of Fox Point, adopted by the village board of said village on July 23, 1946.

Sec. 1 of such ordinance provides as follows:

> "No building permit for any structure for which a building permit is required shall be issued unless it has been found as a fact by the Building Board by at least a majority vote, after a view of the site of the proposed structure, and an examination of the application papers for a building permit, which shall include exterior elevations of the proposed structure, that the exterior architectural appeal and functional plan of the proposed structure will, when erected, not be so at variance with either the exterior architectural appeal and functional plan of the structures already constructed or in the course of construction in the immediate neighborhood or the character of the applicable district established by Ordinance No. 117 [the general zoning ordinance of the village], or any ordinance amendatory thereof or supplementary thereto, as to cause a substantial depreciation in the property values of said neighborhood within said applicable district."

Subsequent sections of the ordinance provide that the Building Board shall consist of three residents of the village, two of whom shall be architects, and provide a

method of appeal from the decision of the Building Board to the Board of Appeals of the village.

On this appeal it is conceded that relator's application for a building permit disclosed compliance with all provisions of the general zoning ordinance of the village, and the sole reason why the defendant building inspector refused to grant the permit was the failure of the Building Board to make the necessary finding prescribed by sec. 1 of ordinance No. 129 as a prerequisite to the issuance of the permit.

The village of Fox Point was incorporated in 1926. It consists of approximately two and one half square miles, and the entire area has been zoned for residential use only. There is, however, a small business district and a relatively small institutional district permitting churches, lodges, and municipal buildings, but the vast majority of the territory in the village is devoted to residence purposes. The village has developed into a highly desirable residential village, almost entirely built up of single family residences.

The learned trial court held the ordinance unconstitutional on the following three grounds: (1) that the preservation of property values is not by itself a proper obective for the exercise of the police power in enacting a zoning ordinance; (2) that the ordinance essentially is concerned with aesthetics which also is not a proper basis for exercise of the police power; and (3) that the standards prescribed in the ordinance for governing the action and decision of the Building Board are so indefinite as to subject applicants for building permits to the unlimited and arbitrary discretion of such board.

At the outset we deem it advisable to consider the basis in constitutional law for upholding the validity of zon-

ing ordinances, which, by their very nature, do impose restrictions upon the use of private property. We quote from the able opinion by Mr. Justice Owen in *State ex rel Carter v. Harper* (1923) 182 Wis. 148, 151, 153, 196 N.W. 451, 33 A.L.R. 269, as follows:

> "The constitution of this state, sec. 13, art. I., provides that the property of no person shall be taken for pubic use without just compensation therefor, and the Fourteenth amendment of the federal constitution provides that no person shall be deprived of his property without due process of law. These provisions are intended to secure the enjoyment of most substantial and fundamental rights, and the allegation that one is being deprived of his property without just compensation or without due process of law calls for most serious consideration. *It has long been settled, however, that these constitutional provisions interpose no barrier to the exercise of the police power of the state.* Thus it was said in *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 87 N.W. 561, at p. 435, speaking of constitutional limitations upon legislative power:
>
> " 'These limitations, however, according to all the authorities, state and federal, are to be read as not extending so far as to deprive the states of their power to so control the conduct of individuals as to protect the welfare of the community — a power commonly described as the "police power". ' " * * *
>
> " * * * As the interest of society justifies restraints upon individual conduct, so also does it justify restraints upon the use to which property may be devoted. It was not intended by these constitutional provisions to so far protect the individual in the use of his property as to enable him to use it to the detriment of society. By thus protecting individual rights, society did not part with the power to protect itself or to promote its general well-being. *Where the interest of the individual conflicts with the interest of*

> *society, such individual interest is subordinated to the general welfare.* If in the prosecution of governmental functions it becomes necessary to take private property, compsenation must be made. *But incidental damage to property resulting from governmental activities, or laws passed in the promotion of the public welfare, is not considered a taking of the property for which compensation must be made."* (Emphasis supplied).

Keeping in mind the foregoing principles, is the objective of an ordinance in the nature of a zoning regulation, which seeks to protect or preserve property values, embraced within the term "general welfare"? It is the contention of counsel for relator that it is not, because such an ordinance does not tend to promote public health, safety, or morals. We consider this as entirely too restrictive an interpretation of the term "general welfare". As pointed out by the New York court of appeals in *Wulfsohn v. Burden* (1925), 241 N.Y. 288, 150 N.E. 120, 122:

> "The [police] power is not limited to regulations designed to promote public health, public morals, or public safety, or to the suppression of what is offensive, disorderly, or unsanitary, but extends to so dealing with conditions which exist as to bring out of them the greatest welfare of the people by promoting public convenience or general prosperity."

In the recent case of *State ex rel. Wis. Luth. H.S. Conference v. Sinar* (1954), 267 Wis. 91, 95, 65 N.W. (2d) 43, this court upheld the constitutionality of a zoning ordinance of the city of Wauwatosa which excluded private schools other than private elementary schools from class "A" residence districts, and stated:

> "We have recognized that the term 'general welfare' includes considerations of public convenience

> and general prosperity. * * * The presence of the school *will lessen the taxable value of near-by homes* and will deter the building of new homes in the area." (Emphasis supplied.)

However, other considerations in addition to the protection of property values were also stressed in our opinion in *State ex Rel. Luth. H.S. Conference v. Sinar, supra,* to establish that the zoning restriction therein upheld did promote the "general welfare". Cases from other jurisdictions holding that preservation of property values are the legitimate objective of zoning ordinances are: *Wulfsohn v. Burden, supra; Beery v. Houghton* (1925), 164 Minn. 146, 204 N.W. 569, aff'd 273 U.S. 671, 47 Sup. Ct. Rep. 474, 71 L. Ed. 832; *Rice v. Van Vranken* (1928), 132 Misc. 82, 229 N.Y. Supp. 32, aff'd 225 App. Div. 179, 232 N.Y. Supp. 506; *Lionshead Lake, Inc. v. Wayne Township* (1952), 10 N.J. 165, 89 Atl. (2d) 693, 698, appeal dismissed January 19, 1953 for want of substantial federal question 344 U.S. 919, 73 Sup. Ct. Rep. 386, 97 L. Ed. 708.

The New Jersey court, in an opinion by Mr. Chief Justice Vanderbilt, in the recent case of *Fischer v. Bedminster Township* (1952), 11 N.J. 194, 93 Atl. (2d) 378, 384, upheld the validity of a zoning ordinance in a rural community restricting lot sizes to a minimum of five acres each, and declared:

> " * * * there would appear to be ample justification for the ordinance in preserving the character of the community, *maintaining the value of property therein* and devoting the land throughout the township to its most appropriate use." (Emphasis supplied.)

In the earlier New Jersey case of *Griggs v. City of Paterson* (1944), 132 N.J.L. 145, 39 Atl. (2d) 231, it was stated:

> "The proper purpose of zoning is 'conserving the value of property and encouraging the most appropriate use of the land'. *Gabrielson v. Glen Ridge* 176 A. 676, 679, 13 N.J. Misc. 142."

Mr. Edward D. Landels contributed an article entitled "Zoning: An Analysis of its Purposes and its Legal Sanctions" in 17 American Bar Association Journal 163. The author of such article was a prominent member of the Oakland, California, bar, who had served as special counsel for the city of Oakland in zoning cases, and was a member of the American City Planning Institute, Legal Division. Such article contains the following pertinent statement (p. 165):

> "On analysis the primary objects of zoning are found to be, not so much the protection of public health and safety, as the protection of the value and usefulness of urban land, and the assurance of such orderliness in municipal growth as will facilitate the execution of the city plan and the economical provision of public services.
>
> "Zoning results chiefly from an appreciation of the 'inter-dependence of adjoining parcels of land' in urban centers; from a realization that the value and usefulness of each parcel, not only to the owner but to the community, is vitally affected by the use made of the adjoining parcel. It is predicated upon a basic principle of urban land economics, that a certain conformity in use stabilizes and insures the value of land."

While the great weight of authority holds that the police power may be validly exercised in the enactment of zoning ordinances having at least as one of their ob-

jectives the preservation of property values, the Michigan court in *Elizabeth Lake Estates v. Waterford Township* (1947), 317 Mich. 359, 26 N.W. (2d) 788, held that "the conservation of property values is not by itself made a proper sole objective for the exercise of police power", in passing upon a Michigan statute authorizing townships to adopt zoning ordinances "to promote public sanitation, health, safety, and general welfare" even though such statute also specified that "reasonable consideration" should be given, among other things, to "conservation of property values".

We consider it significant that the Michigan court in the *Elizabeth Lake Estates Case* cited no authority other than its own decisions in support of its conclusion. The particular ordinance invalidated provided a minimum of cubic feet contents and square feet of floor area for new dwellings to be constructed in the zoned area, and the court pointed out that this, in reality, had the effect of prohibiting houses being erected costing below a certain sum. The court, therefore, could have grounded its decision on the narrower ground that the ordinance had no reasonable relationship to the objective of conserving property values, instead of holding such objective improper. In the instant case it is not urged that the ordinance before us had the indirect effect of requiring homes to be erected in the village to have a minimum cost, nor do we believe such objection could be validly raised against such ordinance. The *Elizabeth Lake Estates Case* decision is directly contrary to the well reasoned opinion of Mr. Chief Justice Vanderbilt of the New Jersey supreme court rendered in *Lionshead Lake, Inc. v. Wayne Township, supra,* upholding a township zoning ordinance requiring homes to have a minimum square footage of floor space.

We have no difficulty in arriving at the conclusion that the protection of property values is an objective which falls within the exercise of the police power to promote the "general welfare", and that it is immaterial whether the zoning ordinance is grounded solely upon such objective or that such purpose is but one of several legitimate objectives. Anything that tends to destroy property values of the inhabitants of the village necessarily adversely affects the prosperity, and therefore the general welfare, of the entire village. Just because, in the particular case now before us, property values in a limited area only of the village are at stake does not mean that such threatened depreciation of property values does not affect the general welfare of the village as a whole. If relator is permitted to erect a dwelling house on its land of such nature as to substantially depreciate the value of surrounding property, there is danger that this same thing may be repeated elsewhere within the village, thus threatening property values throughout the village.

The learned trial court held that the objective of the ordinance is grounded largely upon aesthetic considerations, which are insufficient to justify the exercise of the police power. While the ordinance does use the term "architectural appeal", a building permit is only authorized to be withheld in those cases where the architectural appeal of the proposed structure is so at variance with that of structures already constructed, or being constructed, "as to cause a substantial depreciation in the property values" in the immediate neighborhood. This court pointed out in *Jefferson County v. Timmel* (1952), 261 Wis. 39, 61, 51 N.W. (2d) 518, that while the general rule is that the zoning power may not be exercised for purely aesthetic considerations, such rule was under-

going development. In view of the latest word spoken on the subject by the United States supreme court in *Berman v. Parker* (1954), 348 U.S. 26, 75 Sup. Ct. Rep. 98, 99 L. Ed. *63, this development of the law has proceeded to the point that renders it extremely doubtful that such prior rule is any longer a law.

In *Berman v. Parker* the United States supreme court had before it the question of the constitutionality of an Act of Congress providing for slum clearance in the District of Columbia under which appellants' property was included within the boundaries of the district to be condemned for slum clearance purposes, although it was used for store purposes and in no sense constituted slum housing. Appellants urged that the act, insofar as it permitted its property to be taken for such purposes, could not be justified under the police power, but was in violation of the "due process" clause of the Fifth amendment. The court in a unanimous opinion by Mr. Justice Douglas declared (75 Sup. Ct. Rep. at pp. 102, 103):

> "The concept of the public welfare is broad and inclusive. See *Day-Brite Lighting, Inc. v. State of Missouri*, 342 U.S. 421, 424, 72 S. Ct. 405, 407, 96 L. Ed. 469. The values it represents are spiritual as well as physical, *aesthetic as well as monetary*. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. *If those who govern the District of Columbia decide that the Nation's capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.*" (Emphasis supplied.)

While the court in *Berman v. Parker, supra,* was dealing with the "due process" clause of the Fifth amendment, which restricts the power of Congress, and it is the "due process' clause of the Fourteenth amendment which is applicable to state action, we consider such distinction to be immaterial in considering the scope of the police power and its exercise to promote the general welfare.

We now come to the last issue presented, *viz.*, whether the standards set by ordinance No. 129 for governing the functioning of the Building Board of the village are so indefinite as to subject applicants for building permits to the arbitrary discretion of such board. It will be recalled that the ordinance specifically provides for an appeal from the decision of the Building Board to the village Board of Appeals, and, of course, timely court review by certiorari will always lie from the decision of the Board of Appeals.

In order for a building permit to be refused under the ordinance the Building Board must find, as a fact, that the exterior architectural appeal and the proposed plan of structure when erected shall not be so at variance with those of structures already constructed, or in the course of construction, "in the immediate neighborhood" * * * "as to cause a *substantial* depreciation in the property values of said *neighborhood*". The two words of the ordinance which have been singled out as being most objectionable from the standpoint of indefiniteness are *"neighborhood"* and *"substantial"*.

While several cases are cited in which courts have been called upon to define the term *"neighborhood"* we consider the decision of the Iowa court in *Youtzy v. Cedar Rapids* (1911), 150 Iowa 153, 129 N.W. 351, as being the most helpful. That case involved the taking

of land by condemnation, and complaint was made by the appellant land owner that witnesses had been permitted to testify as to sale prices of lands which were so far removed as to not be located in the neighborhood of the property being condemned. The Iowa court, in its opinion, conceded that property to be used by way of comparison or illustration "should be in the same neighborhood or so nearly similar to the one in question that knowledge of the former, and of its value, will afford some degree of aid to the intelligent and fair-minded juror in estimating the value of the latter". It then proceeded to define "neighborhood", and stated:

> "The term 'neighborhood' is one of quite indefinite meaning, and it may well be that in some cases the trial court will permit the inquiry to take a wider territorial range in some cases than it would allow in others. Certainly this court cannot attempt to fix a standard of measurement, and say as a matter of law that the similar property concerning which inquiry may be made is such only as may be found within a given number of feet, yards, or blocks of the property condemned. Counsel for appellant argues, in effect, that, as the word has been used in cases of this class, 'neighborhood' has reference only to adjoining property, but we think this cannot be. The reasonable proposition is that the trial court is vested with discretion to draw the line in each case as shall seem just under all the circumstances developed by the testimony, and that, unless abuse of such discretion is shown, its ruling will not be held reversible error."

While the court in *Youtzy v. Cedar Rapids, supra,* was defining the term "neighborhood" as used in a rule of the common law, instead of a statute or ordinance, we consider the foregoing quotation equally applicable to its use in the instant case in ordinance No. 129. Clearly

"neighborhood", as used in the ordinance, does extend further than adjoining property and may vary according to existing conditions. For example, in a section of the village where the average building lot comprises several acres, the limits of the neighborhood might well be held to extend farther than in the case of an area in the village where building lots average less than an acre each in area.

Although it is impossible for this court in this decision to establish, in terms of measurement of feet, the radius of the largest permissible area which would qualify as a neighborhood under the ordinance, there is undoubtedly in each case a point beyond which a court could hold, as a matter of law, that certain property was not in the same neighborhood as applicant's property, and that it would be an abuse of discretion if the Building Board determined otherwise. In case of a court review some effect necessarily would have to be accorded the adjective *"immediate"* preceding the word "neighborhood" where the latter first appears in the ordinance.

Just because some discretion is necessarily accorded the board to determine the limits of a neighborhood, as applied to a particular applicant's property, does not render the ordinance void. *Milwaukee v. Ruplinger* (1914), 155 Wis. 391, 145 N.W. 42; and *Pinkerton v. Buech* (1921), 173 Wis. 433, 181 N.W. 125. In the first mentioned of said two cases, this court upheld an ordinance of the plaintiff city which prohibited anyone from carrying on a junk shop in the city without a license, and further provided "all applications for license under this ordinance shall be made to the mayor, who may grant or refuse to grant such license as to him may seem best for the good order of the city". The court held the ordinance granting to the mayor the power to grant or refuse

licenses *"as to him may seem best for the good order of the city"* set a sufficiently definite standard, and held the ordinance constiutional. In the *Pinkerton Case* the constitutionality of a statute providing for the licensing of private detectives was upheld which required the approval of the application by the fire and police commission of the city and a finding by the secretary of state that the applicant was *"of good character, competency and integrity."*

Turning now to the word *"substantial"* which has also been attacked by relator as being too indefinite, we find that the Washington supreme court *In Re Krause's Estate* (1933), 173 Wash. 1, 21 Pac. (2d) 268, 270, held that the term *"substantially"* was not so indefinite as to render the contract employing it to be unenforceable. The particular contract provided "neither party shall have the right to make a new will as to property which has pursuant hereto been *substantially* benefited by the other party", with respect to which the court stated:

> " 'Substantial' as an adjective means something worthwhile as distinguished from something without value, or merely nominal."

This court is frequently required to apply the wording of sec. 227.20(1)(d), Stats., "unsupported by substantial evidence in view of the entire record", in cases involving review of determinations by administrative agencies under our Uniform Administrative Procedure Act. We do not recall of any litigant ever having raised the question that the word "substantial" therein rendered such quoted portion of the statute indefinite and void.

Determining whether or not a proposed structure will *"substantially"* depreciate property values in the area is simply the reverse of the common question that must

be answered in the assessing of benefits resulting from a public improvement in levying a special assessment against the benefited property. There the question must be determined whether or not the public improvement benefits property, and if so what property and to what extent.

It is our considered judgment that ordinance No. 129 constitutes a valid exercise of the police power of the village of Fox Point, and its provisions are not so indefinite or ambiguous as to subject applicants for building permits to the uncontrolled arbitrary discretion or caprice of the Building Board.

By the Court. — Judgment reversed and cause remanded with directions to quash the proceedings.

STATE OF WISCONSIN: IN SUPREME COURT

And afterwords to-wit on the 8th day of March, A. D. 1955, the same being the 61st day of said term, the following proceedings were had in said cause in this Court:

State ex rel Saveland Park Holding Corporation,
Respondent,

vs.

Donald G. Wieland, Building Inspector of
Village of Fox Point,
Appellant.

Milwaukee Circuit Court

This cause came on to be heard on appeal from the judgment of the Circuit Court of Milwaukee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Milwaukee County, in this cause, be, and the same is hereby, reversed with costs against the said respondent taxed at the sum of Four Hundred Ninety-three Dollars and Ninety-four Cents ($493.94).

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to quash the proceedings.

Office - Supreme Court, U. S.
FILED
AUG 20 1955
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D., 1955

No. 264

STATE OF WISCONSIN EX REL. SAVELAND PARK HOLDING CORPORATION,

Petitioner,

—vs—

DONALD G. WIELAND, BUILDING INSPECTOR OF VILLAGE OF FOX POINT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

Page

A. The determination of the authority of the Village to adopt the ordinance in question is a determination of state law which is not reviewable by this Court.. 2

B. No violation of Fourteenth Amendment shown.... 2

1. Protection of Property..... 2

Wherein an ordinance the purpose of which is the protection of other property values violates the Fourteenth Amendment to the United States Constitution is not stated. The police power may be exercised not only for public health, safety or morals but also for the general welfare..... 2

2. Aesthetics 5

Assuming the ordinance was based on aesthetics and censored a creative art, it is not stated in what respect this violates the Fourteenth Amendment to the United States Constitution. This is not the basis of the ordinance but its purpose is to prevent an owner from so using his property as to harm other property..... 5

Tne exercise of the police power may be based on aesthetics 6

3. There is no denial of due process..... 8

A definite test is provided by the ordinance requiring the Building Board to find as a fact whether or not a proposed structure, if erected, will cause substantial depreciation of property values in the neighborhood..... 8

The determination of the value of property is a fact constantly determined in applying many laws 8

That an administrative board *might* act arbitrarily does not render an ordinance unconstitutional 9

Page

On the refusal to issue a building permit an applicant has right to appeal to a statutory board of appeals and from there to the Court including the Supreme Court of the state.... 9

4. There is no denial of equal protection..... 11

No arbitrary action is alleged or shown. Petitioner's property receives the same protection as all other property..... 11

There is no delegation of any power to any person to determine what the provisions of the ordinance are nor whether or not it shall be applied 13

5. No substantial Federal question is presented.. 14

Conclusion 15

INDEX TO AUTHORITIES

CASES

Berman v. Parker, 348 U. S. 26, 75 S. Ct. 98, 99 L. Ed. *63 5

Elizabeth Lake Estates v. Waterford, 317 Mich. 359, 26 N. W. (2nd) 788..... 4

Euclid v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303..... 4

Fischer v. St. Louis, 194 U. S. 361, 24 S. Ct. 653, 48 L. Ed. 1018..... 2, 14

Hotel and Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board, 236 Wis. 329, 294 N. W. 632, affirmed 315 U. S. 437, 86 L. Ed. 946, 62 S. Ct. 706..... 13

Lionshead Lake, Inc. v. Township of Wayne, 10 N. J. 165, 89 A. (2nd) 693, Appeal dismissed for want of a substantial Federal question, 344 U. S. 919, 73 S. Ct. 386, 97 L. Ed. 708..... 14

	Page
Mehlos v. Milwaukee, 156 Wis. 591, 146 N. W. 882....	9
Neblett v. Carpenter, 305 U. S. 297, 59 S. Ct. 170, 83 L. Ed. 182.....	2, 14
Nectow v. Cambridge, 277 U. S. 183, 48 S. Ct. 447, 72 L. Ed. 842.....	3
Opinion of the Justices, Mass. Adv. Sheets (1955) p. 823	8
Standard Oil Co. v. Bowling Green, 244 Ken. 362, 50 S. W. (2nd) 960, 86 A. L. R. 648.....	3
State v. Wakeen, 263 Wis. 401, 57 N. W. (2nd) 364..	13
State of Wisconsin ex rel. Wisconsin Lutheran High School Conference v. Sid H. Sinar, Inspector of Buildings of the City of Wauwatosa, Wisconsin, E. L. Vanderjagt, 267 Wis. 91, 65 N. W. (2nd) 43, appeal dismissed for want of a substantial Federal question, 349 U. S. 913, 99 L. Ed. *504, 75 S. Ct. 604.....	14
State ex rel. Beery v. Houghton, 164 Minn., 146, 204 N. W. 569, affirmed 273 U. S. 671, 47 S. Ct. 474, 71 L. Ed. 832.....	4
Washington ex rel. Seattle Title and Trust Co. v. Roberge, 278 U. S. 116, 73 L. Ed. 210, 49 S. Ct. 50....	12
Williams v. Kaiser, 323 U. S. 471, 65 S. Ct. 363, 89 L. Ed. 398	2

WISCONSIN STATUTES

Section 62.23(7)(e)	10
Section 62.23(7)(e) 10, 11, 12 and 13.....	10
Section 274.09	10

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D., 1955

No. 264

STATE OF WISCONSIN EX REL. SAVELAND PARK HOLDING CORPORATION,

Petitioner,

—vs—

DONALD G. WIELAND, BUILDING INSPECTOR OF VILLAGE OF FOX POINT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Certiorari should not be granted because:

A. The main issue presented was the authority for a municipality to adopt an ordinance under the state law which question is not reviewable.

B. No substantial Federal question is involved.

A.

Determination of the scope of state law not reviewable by this Court.

The Wisconsin Supreme Court determined that the Village had authority to adopt the ordinance. So far as this is a determination of the authority of the Village under Wisconsin law it is binding on and not reviewable by this Court.

Fischer v. St. Louis, 194 U. S. 361, 24 S. Ct. 673, 48 L. Ed. 1018.

Williams v. Kaiser, 323 U. S. 471, 65 S. Ct. 363, 89 L. Ed. 398.

Neblett v. Carpenter, 305 U. S. 297, 59 S. Ct. 170, 83 L. Ed. 182.

B.

The arguments seeking to show a violation of the Fourteenth Amendment to the United States Constitution are so tenuous that no substantial Federal question is presented.

1. Protection of property.

The argument is made point 1 of petitioner's brief that under the Fourteenth Amendment to the U. S. Constitution an individual's right to use his property cannot be curtailed solely for the protection of other property values. In just what respect an ordinance the purpose of which is solely to protect property values violates any provision of the Fourteenth Amendment is not stated. Petitioner's error lies in the fact that he considers the exercise of police power must be related to public health, safety, or morals and that it may not operate for the general welfare. We believe this contention is adequately answered in the Supreme Court of

Wisconsin's opinion, 269 Wis. p. 268, 69 N. W. (2nd) p. 220, petitioner's brief Pages 46 and 47.

Nectow v. Cambridge, 277 U. S. 183, 48 S. Ct. 447, 72 L. Ed. 842, cited by petitioner, Page 9 of its brief, has no bearing on the question. That case involved the inclusion of industrial land in a residential district.

The case of *Standard Oil Co. v. Bowling Green,* 244 Ken. 362, 50 S. W. (2nd) 960, 86 A. L. R. 648, cited by petitioner, Page 10 of its brief, has no bearing on the case at bar. In the Kentucky case, the ordinance attacked was passed five years after the plaintiff's filling station had been built and prohibited the establishment *and operation* of a filling station in the residence district created by the ordinance. The sole question presented and determined in that case was whether or not the ordinance, as applied to this pre-existing use, was valid. The evidence established that the operation of the filling station had not been detrimental to persons or property in the neighborhood and that the land on which the filling station was situated was small and almost its entire value was its availability as a filling station. The Court further pointed out that the economic and aesthetic values of the land in the neighborhood so far as they were affected by the filling station had been fixed some years before the ordinance was passed, and the continuation of the filling station would not adversely affect to a further degree the economic or aesthetic status of the neighborhood as it was at the time the ordinance was passed. The Kentucky Court stated, S. W. p. 963, A. L. R. p. 652:

> "Perhaps it may be true, if the phrase 'general welfare' is to include the protection of economic values of adjacent property, the establishment of new service stations may be prohibited in order to protect such value, but that is a different question from ousting a service station already there, and where, as here, the

> economic value of adjacent property has long since been fixed by the location of the station. It may, indeed, even be true that abolition of such service stations from such a residential neighborhood would serve to improve the economic value of the territory left."

Then follows the quotation set forth in petitioner's brief.

Thus, the Kentucky Court case decided simply that the Bowling Green ordinance could not be applied to *eliminate a pre-existing use for the purpose of increasing property values.* In the case at bar there is no attempt to eliminate a pre-existing use and no attempt to increase property values.

Likewise, *Elizabeth Lake Estates v. Waterford,* 317 Mich. 359, 26 N. W. (2nd) 788, has no bearing on this case for it simply determined the extent of zoning power of municipalities under Michigan statutes.

Petitioner seeks to distinguish *State ex rel. Beery v. Houghton* 164 Minn. 146, 204 N. W. 569, affirmed 273 U. S. 671, 47 S. Ct. 474, 71 L. Ed. 832, on the basis that it was simply the same as *Euclid v. Ambler Realty Co.,* 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303. A reading of the decision of the Minnesota Supreme Court in the Berry case in which that Court overruled previous decisions shows the *ratio decidendi* was that the construction of apartment buildings in a residential district destroys the value of the residential lots and depreciates very much the value of the whole territory; the Minnesota Supreme Court holding that an ordinance to prevent this depreciation of property was valid, which was affirmed by this Court. Expressed in the affirmative, that case held that it was a valid exercise of the police power to adopt an ordinance to protect and preserve existing property values.

2. Aesthetics

Under points 2 and 3 of its brief, petitioner argues that an owner's taste cannot be curtailed solely for aesthetic reasons and that censorship cannot be exercised over a creative art. *Assuming* this ordinance was based on aesthetics and did censor a creative art, wherein this violates a right protected by the Fourteenth Amendment to the United States Constitution is not stated.

Further, reading of Section 1 of the ordinance shows the fallacy of these arguments. An owner's taste is not curtailed *solely* for aesthetic reasons and there is no censorship over a creative art. The ordinance permits *any type* of architecture *anywhere* in the Village. It is only when the building which a property owner seeks to erect is so extreme that it will substantially, adversely affect other properties that the owner is restricted in his right to use his property. So long as he affects only himself, the owner may do what he pleases on his property. The prevention of harm to others is what the ordinance prohibits and for this the owner receives the same protection in that other property owners may not harm his property.

Ordinance No. 129 is merely an exercise of the police power to effectuate the old common law maxim *sic utere tuo ut alienum non laedas.*

Petitioner seeks to distinguish *Berman v. Parker,* 348 U. S. 26, 75 S. Ct. 98, 99 L. Ed.* 63 on two grounds:

(1) that it was a condemnation case involving the power of eminent domain,

(2) that the objective sought was the elimination of slums and blight and breeding grounds for crime and disease,

stating that neither of these items are present in the case at bar.

It is true, of course, that the *Berman* case did involve the question of eminent domain but as this Court expressly pointed out in the decision the issue involved was the exercise of police power. Eminent domain is merely one method of exercising the police power. An ordinance of the type at bar is simply another manner and instance of the exercise of the same police power. As to the second distinction, it is a similarily rather than a distinction. Certainly the preservation of property values, as governed by Ordinance No. 129, is one method of preventing the creation of slums and blight in the first instance.

As previously stated, Ordinance No. 129 does not control aesthetics. It makes no effort to tell an owner of property what type of building he shall erect on his property. It simply prevents him from substantially, adversely affecting other property. Even if the ordinance was based solely on aesthetics, it is not unconstitutional.

The following quotation from the *Berman* case clearly shows the validity of this ordinance.

75 S. Ct. p. 102;

> "The power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs. See *District of Columbia v. Thompson Co.*, 346 U. S. 100, 108. We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government; purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature

has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia (see *Block v. Hirsh,* 256 U. S. 135) or the States legislating concerning local affairs. See *Olsen v. Nebraska,* 313 U. S. 236; *Lincoln Union v. Northwestern Co.,* 335 U. S. 525; California State Association v. Maloney, 341 U. S. 105****.

Public Safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. See *Noble State Bank v. Haskell,* 219 U. S. 104, 111*****.

"****The concept of the public welfare is broad and inclusive. See *Day-Brite Lighting, Inc. v. Missouri,* 342 U. S. 421, 424. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's capital should be beautiful as well as sanitary. there is nothing in the Fifth Amendment that stands in the way."

Likewise, there is nothing in the Fourteenth Amendment that stands in the way of the adoption and enforcement of Ordinance No. 129.

Petitioner further attempts to distinguish the *Berman* case by citing the statistics as to the number of buildings

which were beyond repair, had no inside toilets, no bath, etc. This distinction falls when it is remembered that the question presented in the *Berman* case was the applicability of the Act of Congress to the plaintiff's property, which property it was conceded was in no respects substandard and was not even residential property.

See *Opinion of the Justices,* Massachusetts Advance Sheets (1955) p. 823.

3. Due Process

The argument is made under point 5 in the brief supporting the petition that because of wide discretion given to the Building Board without an objective standard, petitioner is denied due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

The Building Board is given no discretion and there is a definite standard to be applied. As shown by Section 1 of the ordinance, the Building Board determines the *fact* whether or not the proposed structure, if erected, will cause a substantial depreciation of the property values in the neighborhood.

The value of property is a fact constantly determined in applying various laws. It must be determined by the assessor in assessing property for real estate taxes; it must be determined by appraisers in appraising property in an estate for estate and inheritance taxes; it must be determined in fixing damages on condemnation; it must often be determined in litigation between individuals, such as ascertaining loss on an insurance claim in the event of fire or other casualty, and in determining damages in breach of contract actions.

Determining whether or not a proposed structure will depreciate property values in the area is simply the reverse

of the common question that must be answered in the assessing of benefits as a special assessment resulting from a public improvement where the question must be determined whether or not the public improvement benefits property, and if so what property and to what extent.

At page 21 of its brief, petitioner argues that the Building Board may operate in an abitrary manner. Possibly this is so, just as any officer or administrative board or even a Court may operate in an arbitrary manner; but this does not make the law unconstitutional.

All laws are administered by men and, because of this, there is always a possibility that the person administering the law will err or even act arbitrarily because of personal reasons. That this human element exists and does not render an ordinance invalid, was recognized in:

Mehlos v. Milwaukee, 156 Wis. 591, 146 N. W. 882, at Wis. p. 607.

> "It is a mistake to suppose that a government by law contemplates law to protect one in liberty to do whatever he sees fit and do it as he sees fit. When we say, ours is a government by law and not by men, we mean that ours is a government based on rights with laws to preserve and conserve those rights, and men to administer those laws. There must be the human element or there could be no administration. Without administration, law would have no vitality. Without law to preserve and conserve rights, vitalized by proper administration, there would be no rights and the very purpose for which governments are founded would fail of effectuation."

It is because of such possibility of arbitrary action as well as error that an appeal to higher Courts are given.

Section 4 of Ordinance No. 129 expressly gives the right of appeal to the Board of Appeals of the Village of Fox Point.

This Board of Appeals is a statutory board required by Wisconsin Statute Section 62.23(7)(e). While this section of the Wisconsin Statutes refers to cities, it also applies to villages pursuant to Wisconsin Statute Section 61.35.

After the decision by the Board of Appeals, a person feeling aggrieved may apply to the Court for the issuance of writ of certiorari. Contrary to the usual situation on the issuance of writ of certiorari, the Court in reviewing the matter is not confined to the record that has been made below but may receive additional evidence. Wisconsin Statute Section 62.23(7)(e), 10, 11, 12 and

> "13. If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence, or appoint a referee to take such evidence as it may direct and to report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify, the decision brought up for review."

From the decision of the lower Court, appeal may be taken to the Supreme Court of the state.

Wisconsin Statutes Section 274.09 Appeals to supreme court, where allowed.

> "(1) Appeals to the supreme court may be taken from the circuit courts unless expressly denied and also from the county courts****and from any court of record having civil jurisdiction when no other court of appeal is provided.****
>
> (2) Said right of appeal applies to final orders and judgments rendered upon appeals from or reviews of the proceedings of tribunals, boards and commissions ****and whether or not the right to appeal is given by the statute which creates the rights, remedy or proceeding."

At each step of the proceeding, the question to be determined is whether or not the Building Board has properly applied the test in the ordinance; and has correctly determined the fact as to whether or not the proposed structure, if erected, will substantially depreciate property values in the neighborhood.

It is, of course, true that experts may differ in their opinion in respect to this test, just as experts may differ whenever the question of the values of property is called in consideration, or the effect of proposed construction on such property as is the case whenever the question is considered as to whether or not a proposed public improvement will benefit adjacent property, and if so, how much. That experts may differ does not make the test indefinite or invalid. Courts exist for the purpose of correcting an erroneous application of such a test.

It must be remembered that before acting in the first place, under the ordinance the Building Board is required to view the site of the proposed structure and to examine the application papers for a building permit which shall include exterior elevations of the proposed structure.

In view of the above discussed procedure, it is difficult to see how petitioner can even argue that he is denied due process of law.

4. Equal Protection

Petitioner in Item 5 agues that it is denied the equal protection of the law guaranteed by the Fourteenth Amendment. It is difficult to understand from petitioner's brief in just what respect it contends that it is denied the equal protection of the law. Apparently, it is on the basis that the Building Board may act arbitrarily and not apply the test in the ordinance correctly. No arbitrary action by the

Building Board is alleged or shown. This Court will not assume that the Board has acted arbitrarily, but in this proceeding attacking, not action by the Building Board under the ordinance, but the validity of the ordinance, must consider that the Building Board acted in accordance with the provisions of the ordinance and found as a fact upon sufficient evidence that petitioner's proposed structure would, if erected, substantially, adversely affect the value of other property in the immediate neighborhood.

As above discussed, ample opportunity is afforded petitioner for relief from any incorrect, improper or arbitrary application of the ordinance. As a reading of the ordinance shows, it applies to every property in the Village, so that petitioner receives the same protection from depreciation to its property that the ordinance gives to other properties.

At Page 23 of its brief, petitioner argues that there is an unconstitutional delegation of powers. Citing *Washington ex rel. Seattle Title and Trust Co. v. Roberge*, 278 U. S. 116, 73 L. Ed. 210, 49 S. Ct. 50. There is no analogy between this case and the case at bar. In the *Roberge* case, there was an ordinance dividing the City into certain use districts, one provision of the ordinance was to the effect that no old people's home should be permitted in a residence district without first obtaining the written consent of the owners of two-thirds of the property within 400 feet of the proposed building. This provision was attacked as an unconstitutional delegation of legislative power. The Court in upholding this contention pointed out that the action of the property owners was uncontrolled by any standard or rule prescribed by legislative action, that there was no provision for review under the ordinance, that the property owners were not bound by any official duty but were free to withhold consent for selfish reasons or arbitrarily and could subject the Trustee to their will or caprice.

None of these factors exist in respect to Ordinance No. 129. There is a definite standard in the ordinance which is applied by the Building Board and property owners cannot by their action determine whether or not the standard shall be applied. Further, the standard is applied by an official body, the Building Board, and from their determination there is a right of appeal.

Consider *Hotel and Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board,* 236 Wis. 329, 294 N. W. 632, affirmed 315 U. S. 437, 86 L. Ed. 946, 62 S. Ct. 706, where it was held that the Statute under consideration, which provided that employees engaged in concerted picketing or a boycott or similar acts, would be guilty of an unfair labor practice unless a majority of the employees had voted to strike, was not an unconstitutional delegation of legislative power to the majority.

This question was also considered in *State v. Wakeen,* 263 Wis. 401, 57 N. W. (2nd) 364, where the Court at Wis. p. 409 quotes with approval the general rule:

> "Then the true distinction, I conceive, is this: The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which cannot be known to the lawmaking power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."

The test to be applied is definitely established by the ordinance and there is no delegation to anyone of any power to determine what the terms or provisions of the ordinance shall be.

5. No substantial Federal question is presented.

We submit the above clearly shows that no substantial Federal question is presented. *Fischer v. St. Louis,* 194 U. S. 361, 24 S. Ct. 673, 48 L. Ed. 1018, *State of Wisconsin ex rel. Wisconsin Lutheran High School Conference v. Sid. H. Sinar, Inspector of Buildings of the City of Wauwatosa, Wisconsin, E. L. Vanderjagt,* 267 Wis. 91, 65 N. W. (2nd) 43, appeal dismissed for want of a substantial Federal question, 349 U. S. 913, 99 L. Ed.* 504, 75 S. Ct. 604.

In *Lionshead Lake, Inc. v. Wayne Township* 10 N. J. 165, 89 A. (2nd) 693, the appeal dismissed for want of a substantial Federal question, 344 U. S. 919, 73 S. Ct. 386, 97 L. Ed. 708. Petitioner seeks to distinguish this case on the basis that New Jersey cases are peculiar to that state and interpret zoning powers granted by the New Jersey constitution. While this may be so, in the case at bar the Wisconsin Supreme Court has interpreted the power given to the Village of Fox Point to enact Ordinance No. 129 in favor of the existence of such power which is a question of state law; and just as in the interpretation of New Jersey law, no substantial Federal question is presented in this interpretation of Wisconsin law.

Neblett v. Carpenter, 305 U. S. 297, 59 S. Ct. 170, 83 L. Ed. 182.

CONCLUSION

We request that the petition for a writ of certiorari be dismissed because the issue determined by the Wisconsin Supreme Court was one of state law and no substantial Federal question is presented.

Respectfully submitted,

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